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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 325

V. F. BOND and AUDREY A. BOND, *Petitioners*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

V. F. Bond and Audrey A. Bond, the petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above entitled cause entered April 9, 1956.

OPINIONS BELOW

The opinion of the Court of Appeals, 232 Fed. 2nd 822, is printed at page 2a of this petition. The opinion of the Tax Court of the United States and its findings of fact appear in the record (R. 175a-182a).

JURISDICTION

The judgment of the Court below was entered April 9, 1956 (App. B, page 10a *infra*). The time for filing this petition was extended to August 20, 1956 by order of the Hon. Hugo L. Black, Associate Justice of the Supreme Court of the United States, entered July 9, 1956 (App. A, page 1a *infra*). Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I. Whether the judgment and opinion of the Court below affirming the judgment of the Tax Court is in conflict with the applicable decisions of this Court in that,

(a) It sustained the determination of the petitioners' net worth as of December 31, 1940, the base year, notwithstanding the fact that such computation did not include all assets on hand as of that date. It excluded inventory in the sum of $10,000.00 reflected by petitioners in their income tax return filed for the calendar year 1940.

(b) It sustained the imposition of the 50% penalty based upon an incomplete net worth computation.

(c) In affirming the decision of the Tax Court on the issue of fraud the Court below did so solely upon an increase in petitioners' net worth without any evidence of concealment or subterfuge and, therefore, is in conflict with the decision of the Sixth Circuit in the case of *Wiseley* v. *Commissioner*, 185 F.2d 203 (1950) reversing 13 T. C. 253.

STATUTES

The applicable provisions of the Internal Revenue Code (1939) are herein set forth.

STATUTES INVOLVED

Section 22(a), Internal Revenue Code (1939):

> "(a) General Definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . . "

Section 41, Internal Revenue Code (1939):

> "The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net

income shall be computed on the basis of the calendar year."

Section 113(a), Internal Revenue Code (1939):

"(a) Basis (Unadjusted) of Property.—The basis of property shall be the cost of such property; except that— . . . "

Section 133(b), Internal Revenue Code (1939):

"(b) Adjusted Basis.—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided. . . . "

Section 114(a), Internal Revenue Code (1939):

"(a) Basis for Depreciation.—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113(b) for the purpose of determining the gain upon the sale or other disposition of such property."

Section 275(a), Internal Revenue Code (1939):

"(a) General Rule.—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

Section 275(c), Internal Revenue Code (1939):

"(c) Omission from Gross Income.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may

be begun without assessment, at any time within 5 years after the return was filed"

Section 293(b), Internal Revenue Code (1939):

"(b) Fraud.—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2)."

STATEMENT

On March 8, 1950, the Commissioner of Internal Revenue issued a statutory notice of deficiency imposing the assessment of additional income taxes and the 50% fraud penalty predicated upon an increase in petitioners' net worth for the years 1941 through 1947, inclusive. The deficiencies and the fraud penalty for each of the years are reflected in the following tabulation:

Docket No. 28860

Year	Deficiency	50% Penalty
1941	$ 3,153.07	$ 1,576.54
1942	1,812.26	906.13
Total	$ 4,965.33	$ 2,482.67

Docket No. 28859

Year	Deficiency	50% Penalty
1943	$11,263.85	$ 5,631.93
1944	30,098.15	15,049.08
1945	38,517.07	19,258.54
1946	29,705.71	14,852.86
1947	23,006.36	11,503.18
Totals	$132,591.14	$66,295.59

As the result of certain adjustments to the original statutory notice of deficiency, the deficiencies and penalties which were involved before the Tax Court are as follows:

Year	Deficiency	50% Penalty
1942	$ 7,890.65	$ 3,945.33
1943	11,192.01	5,596.01
1944	30,656.79	15,328.40
1945	39,492.83	19,746.42
1946	30,376.82	15,188.41
1947	44,927.30	22,463.65

The construction of the net worth giving rise to the foregoing deficiencies was based upon information reflected by the petitioners in their income tax returns (R. 167a).

Certain assets known to be in existence as of December 31, 1939 were omitted from the base year (1940) in determining the increase in petitioners' net worth (R. 156a). The exclusion of these assets had the effect of depressing the petitioners' net worth by the sum of $15,625.90 in the base year (1940) (R. 152a-153a).

REASONS FOR GRANTING WRIT

1. In affirming the deficiencies, against the petitioners, based upon a net worth which excluded substantial assets from the base year, the judgment below is in conflict with the applicable decisions of this Court expressed in the case of *Holland* v. *U. S.*, 348 U.S. 121-132.

2. Based upon the erroneous net worth computation, and without evidence of concealment or fraudulent conduct, the Court below sustained the imposition of the 50% fraud penalty for each of the years 1942 to

1947, inclusive, in the total amount of $81,471.66. This is contrary to the uniform Federal decisions and is in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *Wiseley* v. *Commissioner,* 185 F. 2d 203 (1950) reversing 13 T. C. 253.

3. Assets consisting of improvements to real estate totaling $15,625.90 were excluded from the base year of 1940 and an asset in the form of inventory reflected by petitioners in their income tax return for the year 1940 in the sum of $10,000.00 was likewise excluded.

4. The construction of the net worth, upon which the deficiencies were determined, was accomplished by employing the information contained in the petitioners' income tax returns for each of the years in question. The only information appearing in the net worth computation not obtained from petitioners' income tax return was that of petitioners' bank balance.

5. For the years 1941 to 1945, inclusive, there was no omission of specific items of income except that of a check in the approximate amount of $2,400.00 received by the petitioners from Standard Oil Company in 1944 (R. 165a).

CONCLUSION

When consideration is given to all the factors contained in the record, justice will be reproached should the judgment of the Court below in sustaining the imposition of fraud be upheld without any evidence which clearly and convincingly establishes fraudulent conduct on the part of the petitioners.

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APPENDIX A

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. .....

V. F. BOND and AUDREY A. BOND, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 20th, 1956.

/S/ HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 9th day of July, 1956.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7131.

V. F. BOND and AUDREY A. BOND, V. F. BOND,
Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

ON PETITION TO REVIEW THE DECISIONS OF THE TAX COURT OF THE UNITED STATES.

(Argued March 22, 1956. Decided April 9, 1956.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

Ellsworth T. Simpson for Petitioners; and Stanley P. Wagman, Attorney, Department of Justice, (Charles K. Rice, Acting Assistant Attorney General, Lee A. Jackson and Robert N. Anderson, Attorneys, Department of Justice, on brief) for Respondent.

DOBIE, Circuit Judge:

This is a petition to review two decisions of the Tax Court of the United States imposing deficiency assessments of $162,942.87 and fraud penalties of $81,471.46 for the years 1942 to 1947, inclusive, against V. F. and Audrey A.

Bond, husband and wife. The proceedings were docketed as two separate actions, the first for the years 1941 and 1942, against V. F. Bond, and the second for the years 1943 to 1947, against V. F. Bond and Audrey A. Bond. They were consolidated for hearing and decision.

The matter originated as a civil action with the issuance, by the Commissioner, of a statutory notice of deficiency dated March 8, 1950, against V. F. Bond (hereinafter called the taxpayer) and his wife. The deficiency was predicated upon increase in taxpayer's net worth for the years 1941 to 1947, inclusive, and included the 50% fraud penalty provided for by Section 293(b) of the Internal Revenue Code of 1939, (26 U. S. C. A. 1952 ed. Sec. 293(b)).

The Tax Court found that the taxpayer received the amounts of income as determined by the Commissioner by use of the net worth and expenditures method and as alleged in his amended answers, except that second trust notes received by the taxpayer upon the sale of real estate are to be included in the net worth computation at their fair market value rather than at their face value. The Tax Court further found that a part of the deficiencies for each year was due to fraud with intent to evade tax.

For the purposes of this review, two questions are before us.

(1) Whether the Tax Court's determination of deficiencies in income taxes based upon increases in the taxpayer's net worth was clearly erroneous.

(2) Whether the Tax Court's determination that such deficiencies were due to fraud with intent to evade tax was clearly erroneous.

We find neither determination clearly erroneous. The decisions of the Tax Court must, therefore, be affirmed.

Various facts were stipulated by the parties and were incorporated by reference into the Tax Court's Findings

of Fact. They included the amounts of taxpayer's bank deposits and cash balances at his bank throughout the tax years in question and the amount of his federal income tax payments for these years. In addition, the Tax Court made the following relevant Findings of Fact:

> "V. F. Bond * * * and his wife, Audrey A. Bond, were residents of Arlington, Virginia, during the years in question. Petitioner filed an individual return for the taxable year 1942, and he and his wife filed joint returns for the remaining years in issue—all with the collector of internal revenue for the district of Virginia.
>
> "Petitioner operated a retail coal and lumber business, a hotel business, a restaurant, a filling station, and a fuel oil business during the year in issue. He also built, remodeled, and sold houses and dealt extensively during the last 2 years in issue in second trust notes secured by real property. Petitioner employed a bookkeeper but personally prepared much of the information from which his attorney made up his income tax return each year.
>
> "Respondent determined that the returns which the petitioners filed did not correctly reflect their true income and, by use of the net worth and expenditures method, determined that they received income far in excess of that reported on their returns. The petitioners do not contest the respondent's right to use the net worth method. Set forth below are the amounts of income or loss reported by petitioners on their returns, the increase in their net worth which they concede occurred during the years in issue, the increase in their net worth determined by the respondent, and, by the addition thereto of uncontested amounts of nondeductible expenditures, the amounts of income which he determined they received:

Year	Income Reported	Conceded Increase in Net Worth*	Respondent's Determination of Increase in Net Worth*	Respondent's Determination of Income
1942	$(8,336.38)	$18,550.54	$18,361.19	$22,561.19
1943	9,585.89	22,939.18	25,713.22	30,545.82
1944	1,176.11	49,036.41	49,114.47	54,886.72
1945	5,515.46	65,346.93	64,881.50	67,457.66
1946	16,894.57	41,140.53	139,385.68	74,802.33
1947	32,487.05	86,911.05	82,185.32	94,555.32

* Not adjusted for nontaxable portions of long-term capital gains.

* * * *

"Petitioner owned real estate located at 2805 Jefferson Davis Highway, Arlington, Virginia, which he purchased in 1937 for $15,000. He operated his retail coal and lumber business as well as his hotel and restaurant on this property. From 1937 to 1939 he made improvements to the property consisting of a railroad siding, a coal unloading trestle, a reinforced concrete warehouse, excavation and dirt removal, concrete paving, and the addition of large weighing scales. Petitioner's returns for 1938 and 1939, when most of the improvements were made, show large expenditures under the caption "Merchandise bought for sale," in his computation of cost of goods sold. There were also large expenditures for repairs. No depreciation was ever claimed on any depreciable improvement on returns for subsequent years, including those in issue. A part of the property was sold in 1946 for $55,000. On his return for that year, the petitioner claimed a cost basis of $91,000, and a long-term loss of $36,000.

"Petitioner maintained no inventory records during the years in issue. On a financial statement filed with an Alexandria, Virginia, bank in 1947 for the purpose of obtaining a loan, petitioner stated that he had 'other income' of $60,000 per year, and understood that state-

ment to mean 'net' income. Later in that year, he wrote a letter to another Alexandria bank, stating that his net worth was $735,184.09.

"Petitioner received the amounts of income as determined by respondent by use of the net worth and expenditures method and as alleged in his amended answers, except that second trust notes received by petitioner upon the sale of real estate are to be included in the net worth computation at their fair market value as herein determined rather than at their face value.

"A part of the deficiencies for each year was due to fraud with intent to evade tax."

Taxpayer refers us to additional facts in the record which he feels are vital to the decision in this case. Specifically, the record discloses that taxpayer's education was limited to the seventh grade, his knowledge of bookkeeping was limited, that during the "war years" in particular he worked long hours, and that his books and records for the years 1940 to 1943 had been destroyed prior to 1947 and were thus unavailable when the examination began. Further, taxpayer points out that the record reveals that the Commissioner on review did not find any omission of income in his books for the years 1944 to 1947 nor omission of income from interest, rent or discount income in the tax returns filed by taxpayer for the years 1941 to 1945 (except one check in 1944; there were omissions of discount income in 1946 and 1947); that testimony of a certified public accountant who audited taxpayer's books and records for the years 1944 to 1947 indicated that such books failed to distinguish between capital expenditures and operating expenses; and that for the tax years in question, and with the exception of taxpayer's bank account, the Commissioner on review constructed the net worth principally from information appearing in taxpayer's income tax returns.

The first question, which relates to the deficiencies in income tax determined by the Tax Court upon the basis of the net worth plus personal expenditures method, involves now two specific items of controversy. They are (1) the failure to include in taxpayer's opening net worth the cost of improvements which he made to property at 2805 Jefferson Davis Highway sometime prior to December 31, 1941; and (2) the Commissioner's failure to include inventories in the net worth computation. As to both items, the Tax Court concluded that the taxpayer failed to sustain the burden placed upon him to overcome the presumptive correctness of the Commissioner's determination of the deficiencies. We find ample support for this conclusion.

The nature of taxpayer's complaint is that the Tax Court acted arbitrarily, in constructing his net worth from information appearing on his income tax returns but ignored the inventory which appeared on his return as of December 31, 1940; and in excluding certain assets from taxpayer's net worth because he had erroneously expensed them.

As to the exclusion of taxpayer's improvements, the Tax Court noted that taxpayer conceded that one of the reasons his books and records were not accurate was because he had expensed certain items which were capital in nature. Taxpayer testified as to the cost of these improvements; but had no records of any kind to substantiate his testimony. In fact, the only evidence offered by taxpayer on this point was his own testimony.

Clearly, some of the claimed improvements were not paid for by the taxpayer, as was the case of the major portion of the railroad siding. Taxpayer sought to claim no depreciation on these depreciable improvements. In addition to its inability to make any determination of the cost of the alleged improvements, the Tax Court had grave doubts as to whether such improvements were, in fact, capital in nature rather than deductible expenses in the year when

made. Too, the Tax Court was rightly concerned, we think, with the taxpayer's reaping an immediate tax benefit by expensing such items the year when made and now taking a contrary position and reaping a double tax benefit therefrom.

We conclude on this point that these were all matters which the Tax Court properly considered, going to the weight of the evidence and the credibility of the witnesses. The findings of the Tax Court are not clearly erroneous and will not be upset by this Court. *Pusser* v. *Commissioner,* 4 Cir., 206 F. (2d) 68; *Timmons* v. *Commissioner,* 4 Cir., 203 F. (2d) 831, cert. denied 346 U. S. 860.

As to the exclusion of taxpayer's inventories, the Tax Court said:

> "Insofar as inventories are concerned, petitioner admitted that he kept no inventory records, but argues that inventories should have been included in the net worth computation. By not including inventories in such computation, the respondent assumed that they remained relatively constant during the years in question. There is no showing in the record that that is an unreasonable assumption and we conclude that he did not err by failing to include inventories in his computation of income. Eugene Vassallo, 23 T. C. 656 (1955)."

We think this result is neither clearly erroneous nor arbitrary, when it is considered that taxpayer admittedly kept no inventory records; that he was unable to prove the inventory figures which he claimed; and that, in the light of this and taxpayer's exaggerations as to other items, the Commissioner concluded that at best, these figures were haphazard guesses.

Taxpayer has admitted that uniform elimination of inventories throughout the net worth computation, if rela-

tively constant, had no appreciable effect on the computation. It is apparent that taxpayer has not proved that such inventories, if they existed, were not relatively constant. The Tax Court's conclusion must be sustained.

The final matter for our consideration relates to the 50% fraud penalty imposed upon taxpayer for fraudulently filing returns for the years 1942 to 1947, inclusive, with intent to evade taxes. The burden of proof was upon the Commissioner to show by clear and convincing evidence that these returns were fraudulently filed. We think the Tax Court's Finding of Fact that a part of the deficiencies for each year was due to fraud with intent to evade tax is clearly proved and should be upheld. *Staudt* v. *Commissioner,* 4 Cir., 216 F. (2d) 610; *Greenfeld* v. *Commissioner,* 4 Cir., 165 F. (2d) 318.

The Tax Court was impressed with the fact that taxpayer's understatements of income were too large, too consistent, over too long a period, to be attributable to mere inadvertence or error. Taxpayer had conceded that his income in each of the tax years in question was at least twice as great, and sometimes many times greater, than that reported on the returns. Compare, for example, the year 1944 when taxpayer reported income of $1,176.11 and the Commissioner determined the amount to be $54,886.72. This was considered as highly persuasive evidence of fraudulent intent by the Tax Court, which cited in support *Kilpatrick* v. *Commissioner,* 22 T. C. 446, aff'd., 5 Cir., 227 F. (2d) 240; *Rogers* v. *Commissioner,* 6 Cir., 111 F. (2d) 987; and *Vassallo* v. *Commissioner,* 23 T. C. 656.

Taxpayer argues, however, that large understatements alone are not sufficient evidence of fraud, relying on *Wiseley* v. *Commissioner,* 6 Cir., 185 F. (2d) 263, reversing 13 T. C. 253, and upon *Glenn L. Switzer* 20 T. C. 759, and asserts that the record is devoid of any evidence clearly showing fraudulent conduct by the taxpayer. He further complains that the Tax Court failed to set forth any conduct which

could be reasonably construed as indicative of fraudulent intent.

We find taxpayer's claims unfounded. True, the Tax Court was impressed with the size of the understatements; it was also impressed, we think, with the size and extent of taxpayer's operations; his method of personally preparing much of the data and summaries for his attorney to use in preparing his tax returns; his questionable testimony; and the absence of ordinary business records, many of which had been destroyed sometime prior to this examination. All these, we think, lend ample support to the Tax Court's finding.

The decisions of the Tax Court are affirmed.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 325

V. F. BOND AND AUDREY A. BOND, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 175a–182a)[1] are unreported. The opinion of the Court of Appeals (Pet. 2a–10a) is reported at 232 F. 2d 822.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1956. The time for filing a petition for a writ of certiorari was extended to August 20, 1956, by order of Mr. Justice Black dated July 9, 1956. (Pet.

[1] Record references are to the Appendix to the taxpayer's brief in the Court of Appeals.

1a.) The petition for a writ of certiorari was filed on August 16, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the record sustains the determination of the courts below, based on increases in the taxpayer's [2] net worth, that there were deficiencies in income tax for the years 1942–1947.

2. Whether the record sustains the determination of the courts below that a part of the deficiency for each year was due to fraud with intent to evade the tax, subjecting the taxpayer to the 50 percent fraud penalty.

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1939 (Sections 41, 54, and 293) and the Internal Revenue Code of 1954 (Section 7454) are set forth in the Appendix, *infra,* pp. 8–9.

STATEMENT

The facts, as found by the Tax Court (R. 176a–178a), and as stated by the Court of Appeals (Pet. 2a–6a), may be summarized as follows:

The taxpayer, V. F. Bond, was a resident of Arlington, Virginia, during the years in question. He filed an individual return for the taxable year 1942, and he and his wife filed joint returns for the remaining

[2] Mrs. Bond's activities and income are not in controversy, and she is interested only because joint returns were filed for all taxable years except 1942; therefore, Mr. Bond alone will be referred to as the taxpayer.

years in issue, 1943 through 1947, all with the Collector of Internal Revenue for the District of Virginia. (R. 176a; Pet. 4a.)

The taxpayer operated a retail coal and lumber business, a hotel business, a restaurant, a filling station, and a fuel oil business during the years in issue. He also built, remodeled, and sold houses and dealt extensively during the last two years in issue in second trust notes secured by real property. Taxpayer employed a bookkeeper but personally prepared much of the information from which his attorney made up his income tax returns each year. (R. 176a–177a; Pet. 4a.)

The Commissioner determined that the returns which the taxpayer filed did not correctly reflect his true income and, by use of the net worth and expenditures method, determined that he received income far in excess of that reported on his returns. The taxpayer does not contest the Commissioner's right to use the net worth method. He concedes that his books were inadequate. (R. 177a; Pet. 4a.) Those for 1940 to 1943 had been destroyed prior to 1947 when the examination began (Pet. 6a). During the years in issue he maintained no inventory records (Pet. 5a).

There is set forth in the findings of the courts below (R. 177a; Pet. 5a) a tabulation showing the reported income for the years in issue, also the increases in net worth and the Commissioner's determination of income for those years.

The Tax Court found that the taxpayer received the amounts of income as determined by the Com-

missioner with certain modifications which are no longer in controversy. The Tax Court also upheld the Commissioner's imposition of the 50 percent fraud penalty for the years in issue under Section 293 (b) of the 1939 Code, finding as an ultimate fact that part of the deficiencies for each year was due to fraud with intent to evade tax. (R. 178a; Pet 6a.) The Court of Appeals affirmed (Pet. 2a–10a).

ARGUMENT

The decision below, affirming that of the Tax Court, is clearly correct. There is no conflict of decisions, and there are no grounds calling for further review. The issues raised in the petition for certiorari are essentially factual in character, and the Court of Appeals upheld the findings of the Tax Court. "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Investors,* 335 U. S. 211, 214; *Corn Products Co.* v. *Commissioner,* 350 U. S. 46, 51. There is no such showing in the instant case.

1. The Court of Appeals rightly upheld the Tax Court's determination of deficiencies based upon increases in net worth. Conceding that his books were inadequate and that it was proper to employ the net worth method of computing income (R. 177a; Pet. 4a), the taxpayer's only objection to the Tax Court's determination is grounded upon the exclusion of certain alleged assets from opening net worth. Taxpayer contends (Pet. 6–7) that assets consisting of improvements to real estate and an asset in the form of in-

ventory were erroneously excluded. The courts below rejected that contention largely on grounds of failure of proof. They both concluded (R. 179–181a; Pet. 7a–8a) that taxpayer failed to show that he had actually made improvements or had inventories in the amounts claimed or that inventories had varied from year to year.[3]

The courts expressed grave doubts as to whether the alleged real estate improvements were, in fact, capital in nature rather than deductible expenses in the year made; indeed, the record indicates that taxpayer actually claimed as expenses and deducted from income the cost of whatever improvements were made at the time they were made. (R. 180a; Pet. 7a–8a.) The courts were justified in giving weight to the inconsistency in the taxpayer's position. *Orange Securities Corp.* v. *Commissioner,* 131 F. 2d 662 (C. A. 5th); and see *Commissioner* v. *Mellon,* 184 F. 2d 157, 160 (C. A. 3d); *Crosley Corp.* v. *United States,* 229 F. 2d 376, 380 (C. A. 6th).

As to the exclusion of inventories from the net worth computation, the Court of Appeals aptly said (Pet. 8a–9a):

> We think this result is neither clearly erroneous nor arbitrary, when it is considered that taxpayer admittedly kept no inventory records; that he was unable to prove the inventory figures which he claimed; and that, in the light of

[3] In this connection, taxpayer had the burden of proof. *Carmack* v. *Commissioner,* 183 F. 2d 1 (C. A. 5th), certiorari denied, 340 U. S. 875; *Bryan* v. *Commissioner,* 209 F. 2d 822 (C. A. 5th), certiorari denied, 348 U. S. 912.

> this and taxpayer's exaggerations as to other items, the Commissioner concluded that at best, these figures were haphazard guesses.
>
> Taxpayer has admitted that uniform elimination of inventories throughout the net worth computation, if relatively constant, had no appreciable effect on the computation. It is apparent that taxpayer has not proved that such inventories, if they existed, were not relatively constant. The Tax Court's conclusion must be sustained.

In the circumstances, there is plainly no adequate basis for taxpayer's assertion (Pet. 6) of conflict with *Holland* v. *United States,* 348 U. S. 121, 132, since the taxpayer failed to prove that he had any substantial assets that were omitted from the opening net worth.

2. Taxpayer's contention (Pet. 6–7) that the fraud penalty was wrongfully imposed is without merit, and there is no conflict with *Wiseley* v. *Commissioner,* 185 F. 2d 263 (C. A. 6th), where the court found factors which explained to its entire satisfaction the errors in the taxpayer's returns.

Both of the courts below recognized that the Commissioner had the burden of proof as to this issue (Internal Revenue Code of 1954, Section 7454, Appendix, *infra,* p. 9) and both of them held that the burden was carried. (R. 181a–182a; Pet. 9a–10a.) Not only were there consistent understatements of income in large amounts over a period of years but there were other factors summarized as follows by the Court of Appeals (Pet. 10a):

> * * * the size and extent of taxpayer's operations; his method of personally preparing much of the data and summaries for his attorney to use in preparing his tax returns; his questionable testimony; and the absence of ordinary business records, many of which had been destroyed sometime prior to this examination. All these, we think, lend ample support to the Tax Court's finding.

The decision below is in line with many others where fraud penalties have been imposed, such as *Kilpatrick* v. *Commissioner,* 22 T. C. 446, affirmed, 227 F. 2d 240 (C. A. 5th); *Lee* v. *Commissioner,* 227 F. 2d 181 (C. A. 5th), certiorari denied, 351 U. S. 982; *Bodoglau* v. *Commissioner,* 230 F. 2d 336 (C. A. 7th); *Koscove* v. *Commissioner,* 225 F. 2d 85 (C. A. 10th); *Rogers* v. *Commissioner,* 111 F. 2d 987 (C. A. 6th); *Canton* v. *United States,* 226 F. 2d 313 (C. A. 8th), certiorari denied, 350 U. S. 965; *Vassallo* v. *Commissioner,* 23 T. C. 656. And we know of no decision that could fairly be said to be conflicting.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER, 1956.

APPENDIX

Internal Revenue Code of 1939:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U. S. C. 41.)

SEC. 54. RECORDS AND SPECIAL RETURNS.

(a) *By Taxpayer.*—Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

* * * * *

(26 U. S. C. 54.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50

per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).

(26 U. S. C. 293.)

Internal Revenue Code of 1954:

SEC. 7454. BURDEN OF PROOF IN FRAUD AND TRANSFEREE CASES.

(a) *Fraud.*—In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary or his delegate.

(26 U. S. C. [1952 ed. Supp. III] 7454 (a)).

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